

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 23-10063 (SHL)

4 Adv. Case No. 23-01190 (SHL)

5 - - - - - x

6 In the Matter of:

7

8 GENESIS GLOBAL HOLDCO, LLC, et al.,

9 Debtors.

10 - - - - - x

11 GENESIS GLOBAL CAPITAL, LLC,

12 Plaintiffs,

13 v.

14 ASQUITH,

15 Defendants.

16 - - - - - x

17

18

19 United States Bankruptcy Court

20 300 Quarropas Street, Room 248

21 White Plains, NY 10601

22

23 November 30, 2023

24 11:10 AM

25

1 B E F O R E :

2 HON SEAN H. LANE

3 U.S. BANKRUPTCY JUDGE

4

5 ECRO: UNKNOWN

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 HEARING re Omnibus Hearing

2

3 HEARING re Amended Notice of Agenda for Hearing to be Held

4 November 30, 2023 at 11:00 a.m. (Prevailing Eastern Time)

5 (related document(s) 906, 987)

6

7 HEARING re Doc. #906 Motion to Approve Compromise / Genesis

8 Debtors Motion Pursuant to Federal Rule of Bankruptcy

9 Procedure 9019(a) for Entry of an Order Approving Settlement

10 Agreement with the Joint Liquidators of Three Arrows

11 Capital, Ltd. [REDACTED] (related document(s) 905)

12

13 Adversary proceeding: 23-01190-shl Genesis Global Capital,

14 LLC v. Asquith

15 HEARING re Doc. #2 Motion for Preliminary Injunction or

16 Order Extending Automatic Stay to Non-Debtor Filed on Behalf

17 of Genesis Global Capital, LLC

18

19 HEARING re Doc. #3 (Seal) Motion to File Under Seal Certain

20 Portions of (A) Motion for (I) Preliminary Injunction or

21 (II) Order Extending Automatic Stay to Non-Debtors, (B) The

22 Accompanying Memorandum of Law, (C) The Accompanying

23 Declaration, and (D) The Accompanying Adversary Complaint

24

25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 CLEARY GOTTlieb STEEN HAMILTON, LLP

4 Attorneys for Debtors

5 One Liberty Plaza

6 New York, NY 10006

7

8 BY: LUKE BAREFOOT

9

10 WHITE & CASE LLP

11 Attorneys for Official Committee

12 1221 Avenue of the Americas

13 New York, NY 10020

14

15 BY: COLIN WEST

16 PHILLIP ABELSON

17

18 PROSKAUER ROSE LLP

19 Attorneys for Ad Hoc Group of Genesis Lenders

20 Eleven Times Square

21 New York, NY 10036

22

23 BY: JORDAN SAZANT

24

25

1 HUGHES HUBBARD REED LLP

2 Attorneys for Gemini Trust Company, LLC

3 One Battery Park Plaza

4 New York, NY 10004

5

6 BY: ERIN DIERS

7

8 UNITED STATES DEPARTMENT OF JUSTICE

9 Attorneys for the U.S. Trustee

10 201 Varick Street, Suite 1006

11 New York, NY 10014

12

13 BY: GREGORY ZIPES

14

15 WEIL GOTSHAL MANGES LLP

16 Attorneys for Digital Currency Group, Inc.

17 767 Fifth Avenue

18 New York, NY 10153

19

20 BY: JESSICA LIOU

21

22

23

24

25

1 CHARTWELL LAW

2 Attorney for Eric Asquith

3 170 Worcester Street, Suite 200

4 Wellesley, MA 02418

5
6 BY: DAVID RICH

7
8 LATHAM WATKINS

9 Attorney for Joint Liquidators of Three Arrows Capital

10 1271 Avenue of the Americas

11 New York, NY 10020

12
13 BY: ADAM J. GOLDBERG

1 P R O C E E D I N G S

2 THE COURT: Good morning. This is Judge Sean Lane
3 in the United States Bankruptcy Court for the Southern
4 District of New York. And we are here this morning for the
5 Genesis Global Holdco case as well as for an adversary
6 proceeding, Genesis Global -- well, an adversary proceeding
7 that is contained within a motion that's on for today. So
8 let me start by getting appearances, first from debtor's
9 counsel.

10 MR. BAREFOOT: Good morning, Your Honor, Luke
11 Barefoot from Cleary Gottlieb Steen and Hamilton for the
12 debtors.

13 THE COURT: Good morning. And on behalf of the
14 official committee of unsecured creditors?

15 MR. WEST: Good morning, Your Honor, Colin West of
16 White and Case on behalf of the official committee. And I'm
17 joined today by my partner, Phil Abelson.

18 THE COURT: All right, good morning. And let me
19 find out who's here on behalf of the ad hoc group of
20 claimants.

21 MR. SAZANT: Good morning, Your Honor, Jordan
22 Sazant of Proskauer Rose on behalf of the ad hoc group of
23 Genesis lenders.

24 THE COURT: All right. And given the matters that
25 are on for today, let me find out who might be here for the

1 liquidators of Three Arrows Capital.

2 MR. GOLDBERG: Good morning, Your Honor, Adam
3 Goldberg of Latham Watkins on behalf of the joint
4 liquidators of Three Arrows Capital.

5 THE COURT: All right. And in connection with the
6 Adversary Proceeding 23-1190, who might be here for
7 defendant, Eric Asquith?

8 MR. RICH: Yes, Your Honor. Sorry, let me get my
9 video started up here. Yes, Your Honor, David Rich on
10 behalf of Eric Asquith. Thank you.

11 THE COURT: All right, good morning. And on
12 behalf of the Gemini Trust Company.

13 MS. DIERS: Good morning, Erin Diers, Hughes
14 Hubbard Reed on behalf of Gemini Trust Company.

15 THE COURT: All right, good morning. So I know
16 that, as I always say, there's many, many pages of
17 appearances here and I know lots of folks are here to listen
18 in for today. So at this point, I'll throw it open to any
19 other appearances for folks who have not yet done so who
20 expect that they may speak at today's hearing. And
21 obviously, to the extent that someone doesn't make an
22 appearance because they don't expect to speak and that
23 changes, you can enter your appearance at that time. But
24 anyone else that needs to make an appearance?

25 MS. LIOU: Good morning, Your Honor, Jessica Liou

1 from Weil Gotshal Manges on behalf of Digital Currency
2 Group.

3 THE COURT: All right, good morning. Anyone else?
4 All right. With that, I will turn it over to the debtors
5 and I note that we have an agenda that was filed on the
6 docket. So, counsel, it's to you.

7 MR. BAREFOOT: Thank you, Your Honor, Luke
8 Barefoot from Cleary Gottlieb for the debtors. Your Honor,
9 as we noted -- as you noted, we did file an amended agenda
10 at Docket Item 1001. There are two items on the agenda for
11 today's proceedings. The first is the 9019 motion for
12 approval of the settlement with Three Arrows Capital. That
13 is proceeding on an uncontested basis. And the second
14 matter is the motion for a preliminary injunction in the
15 Asquith adversary proceeding, which is proceeding on a
16 contested basis.

17 Subject to Your Honor's preferences, I propose to
18 take those matters in that order.

19 THE COURT: That would be just fine. Thank you.

20 MR. BAREFOOT: Turning then, Your Honor, first to
21 the Three Arrows Rule 1919 motion which was filed at Docket
22 Item 906, by this motion, Your Honor, the debtors seek
23 authorization for entry into and performance under a
24 settlement agreement with the joint liquidators of Three
25 Arrows Capital.

1 At the outset, Your Honor, we would like to, as an
2 evidentiary matter, move into evidence the declaration of
3 Mr. Tom Conheeny, who is a member of the special committee
4 of the Board of Directors of Genesis Global Holdco LLC. And
5 that declaration was attached to the Three Arrows'
6 settlement motion at Exhibit C.

7 THE COURT: All right. Any objection by any party
8 to the admission of that declaration as evidence in support
9 of this matter? All right, hearing no response. I'm happy
10 to receive that declaration as evidence. Thank you,
11 counsel.

12 (Exhibit C entered into evidence)

13 MR. BAREFOOT: Very good, Your Honor. Turning
14 then to the merits of the settlement, as the Court is aware,
15 the debtors have been engaged in extensive litigation and
16 motion practice with Three Arrows for more than five months
17 in efforts to resolve the proofs of claim that were filed
18 against the debtors' estates, which asserted in excess of \$1
19 billion in damages.

20 The proposed settlement resolves those claims in
21 exchange for a single allowed claim against Genesis Global
22 Capital in the amount of 33 million.

23 Very briefly, Your Honor, the special committee
24 has determined and the debtors submit that the settlement is
25 in the best interest of the debtors' estates and their

1 creditors and is well within the range of reasonableness.

2 And I'll just briefly go through a summary of some of the
3 reasons that our motion sets out establishing that.

4 First, Your Honor, the settlement avoids
5 significant risks and uncertainties, particularly where many
6 of the claims and defenses were somewhat untested in the
7 unique circumstances of the cryptocurrency industry. And
8 that's particularly the case, Your Honor, where it resolves
9 all of the motion practice between the parties including
10 Three Arrows' lift stay motion that's about to have these
11 claims finally adjudicated in alternative fora.

12 Second, Your Honor, the dollar amount of the
13 settlement speaks for itself. Of the more than \$1 billion
14 asserted, the \$33 million allowed claim amount represents
15 approximately 3.3 percent of the asserted amount. And those
16 figures are particularly important given the size of the
17 asserted claim and the impact that it would have on
18 potential distributions under a plan of reorganization if it
19 were not resolved prior to effectiveness.

20 Third, Your Honor, resolving the claims on the
21 terms of the proposed settlement avoids significant fees and
22 expenses of counsel and expert witnesses that would be
23 required given the fact-intensive nature of certain of the
24 objections and the work that would be required to litigate
25 those claims to a final judgment on the merits.

1 Fourth, and perhaps most importantly, Your Honor,
2 while the settlement provides for a global resolution of the
3 claims as between the Genesis debtors and Three Arrows
4 Capital, it expressly preserves any and all claims that the
5 Genesis debtors have against their parent, DGC. So the
6 debtors' claims that any liability associated with the Three
7 Arrows Capital loans were assumed by DCG pursuant to the
8 terms of the assumption and assignment agreement, are in no
9 way compromised by the terms of the proposed settlement.

10 For these reasons and following extensive arm's
11 length negotiations, the special committee has, in its
12 business judgment, approved the settlement.

13 Before asking Your Honor to enter the order, I did
14 want to briefly address three related matters. The first is
15 the form of the revised proposed order. The second is the
16 related sealing motion that was noted on the agenda and the
17 third is the final form of the settlement agreement.

18 On first, Your Honor, the revised proposed order,
19 you may have seen that the settlement agreement effectively
20 contains two related but separate sets of settlement terms
21 in a single document, one as between the debtors and Three
22 Arrows Capital and one as between DCG and Three Arrows
23 Capital. Following a series of conversations with the
24 Office of the United States Trustee, the debtors agreed to
25 clarify the language in the proposed order to make express

1 that the Court's approval of the settlement agreement apply
2 only to the terms of the settlement agreement that concern
3 the Genesis debtors and that the Court is in no way passing
4 on or making any findings with respect to the terms as they
5 pertain to DCG. That revised proposed order, together with
6 the black line, was filed last week at Docket Item 966.

7 There is one additional change that we have
8 discussed with counsel for Three Arrows Capital and that we
9 would propose to make to the revised proposed order. Very
10 briefly, Your Honor, in Paragraph 4, it sets forth the --

11 THE COURT: Hold on a second. There's somebody
12 who's on the phone or doing something else and you need to
13 mute your line because I can hear you, we can hear you, open
14 mic moments are always a bad idea but never more so than
15 when you're in court. So with that Mr. Barefoot, please
16 resume.

17 MR. BAREFOOT: I apologize, Your Honor. Do you
18 have the revised proposed order in front of you?

19 THE COURT: I haven't it. I've seen it. Where
20 would it be in the -- I'm trying to think of where was it?
21 Was in the binder or is it a separate stack? I think it's
22 in the separate stack.

23 MR. BAREFOOT: It should, I'm being told it should
24 be Tab 3.

25 THE COURT: Tab 3. Okay. I know I've seen it.

1 So thank you for the reminder as to where I've seen it.

2 MR. BAREFOOT: Okay, very good, Your Honor. In
3 addition to the changes that we made at the request of the
4 Office of the United States Trustee, in Paragraph 4, which
5 the first sentence of now reads "As set forth in the
6 settlement agreement, the allowed 3AC claim against DGC is
7 hereby allowed in the amount of \$33 million."

8 THE COURT: Right.

9 MR. BAREFOOT: We just revised that to include a
10 clause that says "subject to occurrence of the settlement
11 effective date." The reason for that, Your Honor, is that
12 the settlement agreement only becomes effective not only
13 upon Your Honor's approval but approval by the BBI court
14 overseeing the Three Arrows liquidation. That approval is
15 being sought but has not yet been obtained. So this change
16 is just designed to make clear that the allowance of the
17 claim will only occur once those conditions precedent to
18 effectiveness of the settlement occur.

19 THE COURT: All right. That makes perfect sense.
20 Thank you for pointing that out.

21 MR. BAREFOOT: Okay, Your Honor, then I did want
22 to briefly address and request entry of the order approving
23 the debtor's sealing motion which was filed at Docket Item
24 905. Just very briefly, Your Honor, effectively, because as
25 I mentioned, the terms of the settlement agreement do in

1 part relate to matters solely as between Three Arrows and
2 DCG that are not relevant to this Court's approval, but that
3 could be prejudicial to Three Arrows if they were fully
4 disclosed given its ongoing litigations and negotiations
5 with other creditors. The debtors have sought to seal those
6 portions of the settlement agreement that do not relate to
7 the Genesis debtors. So, subject to any questions Your
8 Honor has, we would request entry of the order approving
9 that sealing motion.

10 THE COURT: All right. Thank you very much. So
11 let me ask first if any party wishes to be heard on the 9019
12 motion itself, that is the settlement motion? And so let me
13 just explicitly call out the committee given the committee's
14 statutory role under the code. Anything from the committee?

15 MR. WEST: Yes, Your Honor, just very briefly. I
16 just wanted to emphasize one aspect of the settlement
17 agreement that was critical to the committee, critical to
18 the committee's non-objection and belief that the settlement
19 does fall within the range of reasonableness, that is the
20 fact as Mr. Barefoot said that that there is no release
21 whatsoever by the debtors or their related parties of DCG or
22 any of its related parties of any claims. All such claims
23 are expressly preserved. And of course, in the no deal
24 posture that we are currently in, that is critical. So with
25 that term in the settlement agreement, it was acceptable to

1 the committee. And that's all I had, Your Honor.

2 THE COURT: All right. Thank you very much. Any
3 other party that wishes to be heard as to the settlement
4 motion? And let me make sure to explicitly call out the
5 Joint Liquidators of Three Arrows Capital if they have
6 anything they wanted to add.

7 MR. GOLDBERG: Thank you, Your Honor, Adam
8 Goldberg of Latham Watkins on behalf of the Joint
9 Liquidators of Three Arrows Capital. We're pleased to be
10 here before the Court today on the result of this dispute
11 and appreciate everyone's time and effort with us. It was
12 certainly a hard fought matter as you know, which I think
13 goes to the support for the settlement as Mr. Barefoot
14 explained to the Court. I rise virtually only to emphasize
15 one additional reason in support of the motion to seal the
16 settlement agreement, which is that in the BBI court, these
17 matters would be sealed in that court as not accessible to
18 the public in the same manner as in the United States. And
19 so in the interest of comity to the BBI proceeding, we would
20 also suggest that the interests of comity support the
21 sealing of the settlement agreement as it pertains to the
22 Three Arrows - DCG matters and those interests of comity are
23 relevant based on the recognition of the BBI proceeding in
24 in our Chapter 11 case.

25 THE COURT: All right. Thank you very much. With

1 that, any other party that wishes to be heard on the 9019
2 motion? All right, hearing no further responses, I am happy
3 to grant the motion seeking to approve the settlement. And I
4 find that it is reasonable and satisfies all the
5 requirements of Rule 9019 and applicable law. That includes
6 the factors in the Second Circuit that should be applied
7 when determining whether the settlement is fair and
8 equitable as set forth in the Iridium case and laid out in
9 the papers filed by the debtors here. And as the case law
10 says, where most of all the factors are satisfied, the
11 settlement should be approved and that the business judgment
12 of the debtor in recommending the settlement should be
13 factored into the Court's analysis. And this is also true
14 of the advice and counsel and thoughts of the parties to the
15 settlement and the professionals.

16 In short, this is a very reasonable settlement.
17 When you apply the factors here to the settlement, there
18 definitely was the prospect of the claims here as well as
19 the claims, similar claims involving FTX to really eclipse
20 the debtor's ability to actually move the case forward.
21 Obviously, it's in the interest -- if there's one thing that
22 parties can agree upon, it's their interest and desire to
23 move the case forward expeditiously for the benefit of all
24 stakeholders. And in addition, given the actual value of
25 the settlement and all the other considerations identified

1 by counsel, I'm happy to approve it.

2 As for the sealing motion, let me ask if any other
3 party wishes to be heard as to the motion to seal? I did
4 hear counsel for the joint liquidators on that point.
5 Anyone else who wanted to weigh in on the sealing motion?

6 MR. ZIPES: Your Honor, Greg Zipes with the US
7 Trustee's Office. My office would just ask that the order
8 stands on its merits. But the statement about comity, my
9 office doesn't necessarily agree with that statement. So we
10 would ask that there not be that additional language in
11 order to extent the parties are contemplating it.

12 THE COURT: Well I don't think anyone would
13 disagree with the fact that the proceedings, those
14 proceedings that are foreign proceedings don't have the same
15 transparency requirements as these proceedings. And to the
16 extent that there's a settlement involving parties that
17 aren't the Genesis debtors, I think the idea is that this
18 case shouldn't serve as a vehicle to publicize information
19 about settlement not involving the debtors where those
20 details about the settlement wouldn't be public in that
21 foreign court. And I don't hear any or I didn't see
22 anything that gave me any reason to believe anyone disputes
23 that as sort of factual circumstance and context for making
24 the sealing motion. Am I right about that? In other words,
25 I don't necessarily -- I'm not interested in writing a

1 comity opinion under these circumstances. So let me allay
2 any concerns that way. But it does seem that when we're
3 talking about things that don't affect the debtor and that
4 involve settlements between Three Arrows and other parties
5 where those terms would not be public by virtue of the
6 proceedings that Three Arrows has elsewhere, that they
7 really shouldn't be made public by virtue of this
8 proceeding. And so I don't know that anybody has made an
9 argument that they should be simply by virtue of this
10 proceeding. So I don't have a quibble with that because
11 again, it doesn't affect these estates. And so, but I may
12 be over overly complicating this Mr. Zipes. I just want to
13 make sure I understand that I have the --

14 MR. ZIPES: Your Honor, I may be overly
15 complicating it as well. So I'm just making this simple
16 point that it's -- it doesn't need to be a part of the, I
17 don't think it needs to be a finding of the Court.

18 THE COURT: All right. So I'll say it this way.
19 I think it is, however -- so the, Rule 107(b) allows the
20 court to direct the documents filed in connection with a
21 motion be filed under seal. And it provides that a court
22 may protect in any respect to a trade secret, confidential
23 research development, or commercial information in 107(b).
24 And so I think the factual circumstances here are relevant
25 to making a finding of that because the idea is that this

1 information is confidential commercial information because
2 it would not be publicized anywhere else. And I just want
3 to make sure I understand that factual circumstance and that
4 nobody disputes those factual circumstances.

5 All right. Hearing nothing, it seems to be pretty
6 straightforward in the paper. So I think I don't need to
7 parse exactly what flavor of legal theory I need to put to
8 that. I'm understanding as to the factual circumstances
9 that underlie the request to seal and under those
10 circumstances, given those facts, I think it satisfies the
11 requirements for sealing under 107(b).

12 I note there is no objection. I think there's no
13 objection because it doesn't affect these estates. And I
14 think counsel for Three Arrows Capital is just concerned
15 about having collateral consequences that would somehow
16 impact his client and parties and the BBI proceedings by --
17 in sort of a collateral way where they were -- it's
18 something that can be avoided. So I find it's appropriate
19 to seal the matters and I'll grant the motion to seal.

20 I do appreciate, given this conversation, the fact
21 that parties are sensitive about the scope of the sealing.
22 And so I think the papers are very clear that it doesn't --
23 it's nothing that affects the debtors, these estates and so
24 therefore, there's no concern about the transparency because
25 it's not affecting these estates.

1 So with that, thank you very much for the obvious
2 work and care that went into identifying what the concern is
3 and crafting an appropriate motion and proposed order to
4 address that concern and no further. So with that, I'm
5 happy to grant that motion. And so let me ask Mr. Barefoot,
6 is there anything else to address on Roman numeral I of our
7 agenda or should we move on to the adversary proceeding?

8 MR. BAREFOOT: Your Honor, I believe that resolves
9 everything under Roman numeral I and we will submit a
10 revised, a revised proposed order on the settlement and the
11 proposed order attached to the motion with regard to the
12 sealing.

13 THE COURT: All right, thank you very much. All
14 right. Next up is the motion for entry of a preliminary
15 injunction or an order extending the automatic stay to a
16 non-debtor. And so with that, it is the debtor's motion.
17 And so I'll hear from the debtor first. But before I do
18 that, I just wanted to throw out a few thoughts that --
19 because these issues come up occasionally in cases and there
20 are sometimes things that people are worried about where we
21 can have a discussion and find an appropriate path forward.

22 My understanding, based on the veritable flurry of
23 activity that's been going on in the case, is there's a
24 desire to bring these cases to a conclusion promptly. There
25 is a schedule actually that sets a confirmation hearing on

1 February 14th through 16th and it is, in fact, a plan that
2 is seeking confirmation. It's a liquidation plan and then
3 people are going to sue various people. And that's what it
4 is. It's designed to be as straightforward as it can be,
5 notwithstanding the fact that we may have to litigate
6 certain issues.

7 I mentioned that because the automatic stay timing
8 of it is important, right? So sometimes there are
9 conversations about whether this stay should be extended
10 where a case has just been filed and there's no endpoint in
11 sight. And sometimes motions are filed and concerns are
12 raised about preservation of evidence. And so my thought is
13 here given the timing of the case and the fact that the
14 automatic stay would end after the case is confirmed and the
15 effective date, I didn't know if there was a discussion
16 worth having about sort of preservation of evidence or any
17 sort of representations that might allow the defendant to
18 sort of see its way clear to sort of work something out in
19 connection with the proposed relief. And I mentioned that
20 because there are some things that are mentioned in the
21 motion that are the kinds of traditional things that are
22 mentioned in motions of this type, which are
23 indemnification, obligations and, and burdens. And I have a
24 whole -- it comes up enough that I have a whole folder, hard
25 copy folder in my chambers that I take out from time to time

1 when these issues come up.

2 So, so I'm happy to hear from the debtors first.
3 But I'll just -- to the extent that there's anything worth
4 talking about in terms of trying to move things along from
5 the defendant's point of view, I at least wanted to throw
6 that out there. So before we hear from Mr. Barefoot, is --
7 again, I'm never in the room where people are discussing
8 resolutions of these things and I don't know if there were
9 any conversations or if so where of such conversations were
10 left before we came in here today. So let me hear from
11 counsel for the defendant whether it's worth having a
12 discussion to try to head off a full blown argument on this
13 motion from soup to nuts, but I'll be guided by comments.
14 Counsel?

15 MR. RICH: Thank you, Your Honor. Thank you,
16 Judge Lane. I appreciate it. David Rich on behalf of Eric
17 Asquith. Eric is a consumer, also a lawyer, a former law
18 partner of mine and a close friend. So I'm here on his
19 behalf today. We certainly, if there's any way through the
20 thicket, you know, we are certainly willing to explore that.
21 You know we, I think, my partner who's working on this case
22 with me, I think have spoken with counsel for the debtor,
23 you know, to see if we could give them, you know, some
24 certain time until January, you know, the end of January,
25 some indeterminate time to try --

1 THE COURT: Well, you know, I mean -- so this is
2 the way of handling it for I don't think January is going to
3 do it in the sense of there's a -- that's why I mentioned
4 the confirmation hearing. But one way to do this is
5 sometimes people say, like Judge, we realize there's a
6 confirmation scheduled, but we don't know if things are
7 going to be delayed and we are not driving this bus. And so
8 we want to reserve our rights, but if we have an opportunity
9 to come back and, you know, in February, if the confirmation
10 hearing is not going to happen at that point, and make our
11 arguments at that point. Sometimes people do something like
12 that. But again, I don't want to belabor this too much
13 because it, at a certain point, it'll take longer than the
14 argument will take. But maybe the thing to do is this.
15 I'll ask you to think about it while I hear from Mr.
16 Barefoot. And if there is a path forward, you can let me
17 know when you respond to Mr. Barefoot.

18 MR. RICH: Sure.

19 THE COURT: But again, the cases are littered with
20 some of these same things, talking about things like
21 indemnification and the burden as well as the timing. You
22 know extending an automatic stay of granting or this kind of
23 injunction is not without limits. But again, we're in a
24 better posture than a lot of other cases because we're not
25 at the very beginning. And so there is some -- I think the

1 idea is that there's an end in sight. So with that, Mr.
2 Barefoot, let me turn it over to you to present your
3 argument and we'll see where we end up.

4 MR. BAREFOOT: Thank you very much, Your Honor.
5 Barefoot from Cleary Gotlieb for the debtors. I will be
6 brief in light of the extensive briefing and Your Honor's
7 remarks on the record just now. But at base, Your Honor,
8 the arbitration seeks a judgment on numerous causes of
9 action including fraud concerning the operation of the
10 Gemini Earn program. And while the arbitration has stayed
11 as to the Genesis debtors, if it's permitted to continue at
12 present, Gemini has made clear its intent to pursue
13 discovery against the debtors, effectively seeking to
14 establish its theories that to the extent there was any
15 wrongdoing, it was by the debtors, not by Gemini. That is
16 not speculative. Not only has Gemini served the debtors
17 with document requests, but they have filed a statement in
18 the adversary proceeding reiterating their intent to pursue
19 that discovery.

20 Gemini is also asserted its rights under the
21 indemnification provisions in the Gemini master loan
22 agreements, which would be implicated if the arbitration
23 were permitted to proceed to judgment. Moreover, as Your
24 Honor outlined, this comes at a particularly critical time
25 for the debtors on their path towards emergence, which was

1 set in motion in a very concrete way by Your Honor's ruling
2 on Tuesday to approve the disclosure statement.

3 The risks and downsides of the debtors and their
4 limited remaining personnel being distracted by discovery in
5 this arbitration to the detriment of all creditors, far
6 outweigh any prejudice from a brief stay through
7 effectiveness of a plan of reorganization. And, Your Honor,
8 just finally this makes particularly sense where we're
9 following confirmation and having clarity on the terms of
10 distributions to Gemini Earn users, which as you've heard at
11 the disclosure statement hearing and otherwise, could in
12 some scenarios result in payment in full to those Gemini
13 Earn users. That would, at minimum, narrow the scope of the
14 claims and damages at issue in the arbitration.

15 Your Honor, I just did want to address one
16 housekeeping matter. We had originally moved to seal
17 certain references to the arbitration proceedings, given the
18 confidentiality provisions applicable to those proceedings.
19 Given that Mr. Asquith's opposition discloses in full and
20 redacted terms the arbitral complaint, we think that sealing
21 motion is moot and would intend to withdraw.

22 THE COURT: All right. One thing you could answer
23 for me, Mr. Barefoot, is there's a reference in the papers
24 at various points about various Gemini lenders have
25 commenced or threatened to commence actions, class actions,

1 arbitration proceedings arising out of the Gemini Earn
2 program. And I wanted to understand if those statements
3 mean, as is often the case involving a debtor with extensive
4 operations, that the proceeding in question is not
5 necessarily a one-off meaning that whether there are other
6 potential proceedings just like this that are likely. I see
7 Mr. Asquith's counsel nodding yes, so I think I may have my
8 answer, but other potential proceedings of this type that
9 could be brought that would involve the debtors and raise
10 the same issues?

11 MR. BAREFOOT: So, Your Honor, there certainly are
12 a broad range of arbitration and other proceedings brought
13 by Gemini Earn users. That said, none of those proceedings
14 have gotten to this stage where we are proceeding towards a
15 merits hearing that has necessitated Gemini pursuing the
16 debtors to establish its defenses as to the claims that are
17 being brought.

18 THE COURT: But let me ask this another way. A
19 ruling denying your motion, would it raise the essentially
20 come-one-come-all message to folks to say all these cases
21 can go forward, placing the debtor in a position where they
22 have to respond on multiple fronts if not now, someday soon?

23 MR. BAREFOOT: Your Honor, I actually think it
24 very well might. Conversely -- and I'd welcome Ms. Diers
25 Dear from Hughes Hubbard who is closer to some of these

1 arbitrations given that they have been proceeding as to non-
2 debtor, Gemini. But many of the arbitrations have been
3 stayed without the necessity of us obtaining an order from
4 Your Honor. This particular arbitrator, when Gemini made
5 the stay request, requested an order clarifying whether the
6 automatic stay would be extended. So I think if the
7 automatic stay extension motion were denied here, I think
8 that would potentially have significant collateral
9 consequences of having parties go back in the respective
10 arbitrations and ask for those to proceed and necessitate
11 Gemini pursuing discovery and other remedies against the
12 debtors. I also think conversely, if this order were
13 entered, it would similarly send a message to other
14 arbitrators about how this would likely play out and allow
15 parties to conduct themselves accordingly without burdening
16 Your Honor's docket.

17 THE COURT: All right. Well, again, the concern,
18 well, obviously have some interest in not burning my docket.
19 The question is whether it's going to burden the estate.
20 And so -- but that's, I think I have my answer on that
21 front. And so -- and I understand the indemnification
22 really arises out of that Section 22(b) that's attached to
23 that declaration of Jack Massey in support of the motion.
24 And so that seems to be fairly straightforward. Anything of
25 nuance or further to discuss the scope of the

1 indemnification?

2 MR. BAREFOOT: I don't believe so, Your Honor.

3 THE COURT: All right. And I guess last, but not
4 least, I had made some comments at the outset about the
5 timing of the automatic stay issues and that, you know,
6 things aren't stayed forever. And anything you wanted to
7 say on that on that front? I did see your paper said, you
8 know, you're requesting this through the effective date.
9 And so which I think sort of -- is a pre pretty clear
10 statement about how you view the timing, but I just want to
11 make sure there's nothing else you want to add on that
12 topic.

13 MR. BAREFOOT: Your Honor, the only thing I'll
14 add, I don't want to get into disclosing the settlement
15 discussions that we attempted to have with Mr. Asquith's
16 counsel before the opposition papers were filed. But the
17 debtors would certainly be amenable if it will solve the
18 objection, to limiting the request to the end of February
19 for the time being without prejudice to our rights to seek
20 to extend that if the effective date had not occurred by
21 that point, or Mr. Asquith's rights to vacate that if other
22 circumstances developed. We would make that offer now in
23 open court, if that would resolve the opposition. But
24 otherwise, our request would be through the effective date.

25 THE COURT: All right. Thank you very much. All

1 right. So let me hear from counsel from Mr. Asquith.

2 MR. RICH: Thank you, Judge Lane. And, yeah, I'm
3 not sure I understand that. I want to make sure I
4 understand the offer. Are you, I guess, are we -- is that
5 an offer that the arbitration gets to go forward again if
6 there's not a resolution as of February?

7 THE COURT: I think what it means is that people
8 are going to decide not to fight about it now and the
9 debtors are trying to move the case forward and hope to have
10 things wrapped up on a timetable at which point the motion
11 would be moot, but they recognize that nothing in life
12 succeeds as planned. So if it doesn't work out that way,
13 then you reserve your rights to come back to the court and
14 we -- I'm happy to even set a date -- so that you get a --
15 without filing -- frankly, what I would do is carry the
16 motion so that nobody has to go to the expense of submitting
17 additional papers. And everybody reserves their rights.
18 So your cooperation would not be held against you. And it
19 wouldn't be a comment on anything. It would be, well, I'm
20 willing to work with you up to this point. And at that
21 point, Judge, I may have to come back and take a different
22 view.

23 MR. RICH: Yeah. Well, certainly, Judge, I am
24 glad to be cooperative and want to, of course, make the
25 Court and chambers' life, you know, as easy as possible.

1 Certainly, I did not want to be a fly in the ointment and
2 I'm not here today to create any chaos and certainly willing
3 to work with opposing counsel. Quite frankly, I don't feel
4 like what we've been offered has been reasonable. I will be
5 honest, this was a prebankruptcy arbitration that we filed
6 on behalf of Mr. Asquith, who's owed over a million dollars
7 and so it's not an insignificant case. And, of course, the
8 minute that Genesis declared bankruptcy, the automatic stay
9 was in effect. We have not done anything related to them
10 that would affect the estate or harm them or impact them in
11 any way. And essentially, what's happened here is that
12 Gemini has entered into consumer contracts with thousands,
13 with tens of thousands of consumers, not just my client, but
14 other ones. And they admit that these are valid contracts.

15 And so we filed the arbitration and they answered
16 the complaint, Your Honor, and then they engaged in
17 discovery. They produced documents. They agreed to make
18 the Winklevosses available to me for deposition. And then
19 all of a sudden what we heard is, well, now we want to stay
20 because we're going to point the finger at the debtor. And
21 we have a non-debtor pointing finger at a debtor trying to
22 stop consumer arbitration and a contract. And there's
23 thousands of these contracts that are valid, Your Honor.
24 I'm not going to be the last lawyer in front of you on this.

25 THE COURT: But doesn't that prove the point about

1 the resource issues as to the estate? Listen, I'm not here,
2 nobody's asking me to decide this question about
3 indemnification, but there is clearly an indemnification
4 clause and Gemini is pointing the finger at the debtors. So
5 the case law is pretty clear that when a lawsuit is -- it
6 can be construed as even if the debtor isn't the named party
7 as the party in interest, that that's a basis for granting
8 this kind of relief. And I think that's why your efforts,
9 while laudable to say, well, we'll drop the debtor, weren't
10 seized upon by the debtors as an avenue to fix it because
11 they said, well, it doesn't matter because Gemini is going
12 to say, even if you are -- Mr. Asquith is not going after
13 us, Gemini will go after us not only for discovery but as a
14 matter of liability. So if there are tens of thousands of
15 these suits, it does seem to raise the very floodgates
16 argument that courts have found persuasive in the past.

17 MR. RICH: Yeah, I would agree with all of that,
18 Your Honor, except to the extent that all of these
19 consumers, including my client, have independent claims
20 against Gemini that have nothing to do with Genesis. And so
21 --

22 THE COURT: But that's what indemnification is.
23 You say they have nothing to do with the debtors. But
24 Gemini, who you're suing, says it has everything to do with
25 the debtors and they cite to Paragraph 22(b) of the

1 agreement. So again, I'm not here to decide whether they're
2 right or they're not right. But looking at the
3 indemnification clause, it presents a nonfrivolous basis to
4 say that that there's an indemnification possibility. And
5 so I'm not deciding that. I can't -- obviously, it's not
6 my role to decide it, but it is my role to look at it and to
7 give it a little bit of a stress test.

8 MR. RICH: Correct.

9 THE COURT: And frankly, it seems to pass the
10 stress test.

11 MR. RICH: So I would -- I agree with the language
12 of the indemnity provision, Your Honor. I disagree that it
13 passes the stress test unless and until there is a judgment.
14 So, Your Honor, if Gemini wanted to assert a claim against
15 Genesis or Genesis wanted to assert a claim against
16 indemnity against Gemini, then they could have done that.

17 THE COURT: But then they're letting somebody else
18 litigate a lawsuit that they may be on the hook for
19 ultimately because of the indemnification clause.

20 MR. RICH: Correct. But none of this has occurred
21 and there's not a judgment where a claim has accrued.

22 THE COURT: Yeah. But the problem is that when
23 there's a judgment, the debtors will say, well, it's too
24 late, right? So it's essentially a lawsuit against us where
25 we're not going to participate. And then Gemini has told us

1 that they're going to assert indemnification.

2 MR. RICH: And, Your Honor, I think that's the
3 point where Genesis would be able to come to this Court
4 jurisdictionally and ask the Court to help them.

5 THE COURT: But is it? Because if that's the
6 case, there's an adjudication on some issues, not on the
7 issue of indemnification necessarily, but an adjudication on
8 other issues that Gemini will rely upon to say the indemnity
9 clause is triggered. And the question of what's
10 collaterally estopped, either a matter of claim preclusion
11 or issue preclusion, it can be a bit of a thicket at times
12 and the parties' papers don't address that in that kind of
13 detail. And I can understand why, because it's very
14 difficult to predict how these things are going to work.

15 MR. RICH: Yes, Your Honor. I don't agree that
16 they would be collaterally estopped in any of those
17 situations. That would be non-mutual, offensive collateral
18 estoppel. I think the issues we establish in our
19 arbitration are limited to our arbitration. And what I
20 would say is -- I'm not asking the Court today, Your Honor,
21 Judge Lane, I'm not asking you -- I'm not asking Your Honor
22 to rule against them. What we're asking is that we think
23 these issues should be decided by the arbitrator. There are
24 going to be thousands of these cases and each of them,
25 whether or not Gemini, a non-debtor, is entitled to a stay.

1 And our arbitrator, I want to be clear because this is a
2 point of contention that has bothered me and I'm just being
3 honest with the Court. Our arbitrator gave Gemini the
4 opportunity to come to court as a non-debtor and ask this
5 Court to give it some relief. And Gemini didn't do that.
6 Genesis, the debtor --

7 THE COURT: So let me read from a decision in 2014
8 from Judge Keenan in the district court. And I'll give you
9 the cite. It's 2014 US District Lexis 136152. He's
10 confronted with an issue about discovery in the case. And
11 he says the automatic stay does not prevent litigants from
12 obtaining discovery from a debtor as a third-party witness
13 where requests pertain to claims against non-debtor parties.
14 And he cites In Re Residential Capital. But then he goes on
15 to say in situations where third-party discovery of a debtor
16 could burden the bankruptcy proceeding, courts have
17 generally placed the onus on the debtor to seek injunctive
18 relief rather than requiring the party requesting discovery
19 to obtain a lift of the automatic step.

20 And so he's trying to place the burden on the
21 right party to do the right thing. And here, the debtors
22 have done exactly that. They said it's going to impact us.
23 So to the extent it's going to impact us, we need to, we
24 have the burden, as Judge Keenan recognized to seek
25 injunctive relief and that's, that's what we've done. And

1 then Judge Keenan goes on to say, in fact, Section 105
2 provides bankruptcy court with discretion to extend the
3 automatic stay beyond the scopes of 362(a) where necessary
4 appropriate to prevent significant interference with the
5 bankruptcy proceeding.

6 And so based on that decision and other things
7 I've seen, I think the debtors have acted appropriately here
8 because it is their burden. It's not your problem
9 representing Mr. Asquith to say, hey, I've got to seek to
10 lift the stay. Sometimes people do that because they really
11 don't want to -- a bankruptcy stay makes folks nervous. But
12 I agree with Judge Keenan. This is the way it should work
13 that the debtors do have the burden of seeking injunctive
14 relief, but that's what they've done here by virtue of the
15 proceedings we have. So I'm ok with that. So the fact that
16 Gemini didn't do it doesn't really have any significance to
17 me. They're not a debtor. The debtors, they're worried
18 about interference with the bankruptcy case. It's a debtor
19 issue.

20 MR. RICH: Sure. So I don't -- like procedurally,
21 I'm okay with them having done it. I just wanted to point
22 out that Gemini has not state the position of the case. I
23 guess my overarching point here, Your Honor, is that we, we
24 believe, and our position is, that we would like the
25 individual arbitrator under the Federal Arbitration Act,

1 which is a federal statute, that requires the enforcement of
2 provisions that Gemini admits are valid in contracts, we
3 would like the arbitrator in each of those cases to
4 individually decide whether Gemini is entitled to a stay.
5 If they are, they are.

6 THE COURT: But Gemini is not the debtor. I don't
7 think you're listening to what Judge Keenan said. If you
8 want a stay, it's a bankruptcy stay, right? That's what
9 we're talking about. People can do whatever they want in
10 the arbitration. But a debtor has the right to seek, and
11 it's appropriate for a debtor to seek consistent with Judge
12 Keenan's guidance, a stay in this court to say under 105,
13 Judge, we think we're entitled to injunction/an extension of
14 the automatic because of the burden this case will place on
15 the estate for the reasons, the three reasons that they set
16 forth in their papers. So I don't --

17 MR. RICH: I don't --

18 THE COURT: People could do whatever they want to
19 do in arbitration. I'm not going to tell them what they can
20 do or what they can't do. That's not my job. And so -- but
21 I think the question for me is whether it's appropriate for
22 me to entertain this motion. And what I'm telling you is I
23 think it's entirely appropriate for me to entertain this
24 motion.

25 MR. RICH: I don't disagree that it's appropriate

1 for the Court to entertain it. I just don't believe that
2 they're entitled to the relief. If I look at the standard
3 for the exceptions for a non-debtor to obtain some relief
4 from the automatic stay, the only potential argument that I
5 believe that they have here is that there's an identity of
6 interest between the parties. And I don't see how they meet
7 the test.

8 THE COURT: All right.

9 MR. RICH: So it's not simply a matter of, Your
10 Honor, Judge Lane, I don't think it's simply a matter of,
11 you know, whether or not, you know, they properly brought
12 this. Number one, I don't think they meet the standard.
13 Number two, I think under the FAA, under the Federal
14 Arbitration Act, this is an issue of arbitrability that
15 needs to be decided by the arbitrator in each case whether
16 or not they, in fact, need discovery. Because in our case
17 against Gemini, we have independent claims. And all of the
18 information that we need, Your Honor, is in the possession
19 of Gemini. We don't need anything from Genesis. Gemini
20 doesn't need anything from Genesis. We would waive the
21 right -- right now, we would just say whatever you have,
22 we'll take.

23 THE COURT: All right. Anything else, counsel?

24 MR. RICH: No, thank you, Your Honor.

25 THE COURT: Thank you very much. Mr. Barefoot,

1 anything in reply briefly?

2 MR. BAREFOOT: Very briefly, Your Honor. I just
3 point out in terms of counsel's suggestion that it should be
4 decided by the arbitrator, Gemini did originally make the
5 request for the stay to the arbitrator. And the arbitrator,
6 of course, could have just decided that. Instead the
7 arbitrator directed seeking guidance from this Court. And
8 said that in the absence of an order from this Court staying
9 arbitration, there would not be a stay, which is what
10 prompted our motion.

11 Otherwise, Your Honor, I would also note that in
12 terms of Gemini asserting an indemnification claim, Gemini's
13 proofs of claim against the debtors do assert rights under
14 the indemnification provisions of the master loan agreement
15 as contingent claims. And if the arbitration were permitted
16 to go forward and resulted in a judgment, that claim would
17 likely no longer be contingent. I think otherwise, Your
18 Honor, as you said, our papers make clear that we're well
19 within the sets of circumstances where these motions are
20 granted and would request entry of the order.

21 THE COURT: All right. So I think I failed to
22 give you all the name of the case that Judge Keenan's quote
23 was from. So my apologies for that. It's Le Metier Beauty
24 Investment Partners LLC versus Metier Tribeca LLC. So it's
25 a case decided September 25, 2014. So I just wanted to let

1 you know that.

2 So Judge Keenan lays out the standard and the
3 standard -- his decision, I think, is noteworthy and a
4 worthy place to start because it talks about who has the
5 burden to do what in circumstances like this. And I'm not
6 going to tell an arbitrator what to do. That's not my job.
7 And so I -- and I certainly understand an arbitrator saying
8 I am not a bankruptcy person and I will let the bankruptcy
9 court do what the bankruptcy court needs to do. So I think
10 that mutual respect is appropriate. And I can understand
11 why the arbitrator would send it here. And frankly, the
12 issue -- while I appreciate everybody being concerned about
13 burdening the Court -- and certainly is a question about
14 what's appropriate for Gemini. And that was the way it was
15 sort of phrased by defendant's counsel and Gemini, what it
16 can do or can't do. Both of those missed the point. The
17 point is the impact on the estate and the impact on the
18 reorganization. That's what the cases recognized.

19 So Judge Keenan segues from the who has the burden
20 to do this. And after deciding that the debtor does, he
21 talks about the ability to extend the scope of the automatic
22 stay. And alternatively, you could frame it as getting
23 injunctive relief, which is, I think how it's framed in the
24 papers here, where necessary or appropriate to prevent
25 significant interference with the bankruptcy proceeding.

1 And so -- and again, it's citing In Re Residential
2 Capital, 480 B.R. at 536. So here, the debtors have cited
3 three main reasons. They say that the debtor is obligated
4 to indemnify Gemini for its liabilities, losses, costs,
5 damages, and expenses or cause of action arising for any
6 breach by GGC under the Gemini master loan agreement. And
7 it cites Section 22(b) of the agreement. I've looked at
8 Section 22(b). It's pretty straightforward. It basically
9 says borrower hereby agrees to indemnify defend, and hold
10 harmless lender, et cetera, et cetera, et cetera from and
11 against all liabilities to the extent of rising out of or
12 relating to any claim by any third-party based on arising
13 out of or relating to borrowers' breach regarding its
14 representations, warranties, or obligations set forth in
15 this agreement.

16 And so there's caveat at the end that nobody
17 cited. And so therefore, I don't know that it's relevant to
18 anything we're discussing. So that's a pretty
19 straightforward indemnification clause. And I don't see any
20 limiting principles in it that would allow me to navigate in
21 the way I think defendant's counsel is suggesting so that we
22 don't have the concerns of that burden to the estate.

23 And so with that, what does burden mean and what
24 do the cases say about it when looking at extending an
25 automatic stay or granting an injunction? And so courts, in

1 fact, have extended the automatic stay to a non-debtor where
2 an obligation of the debtor to indemnify the non-debtor on
3 the existence of a finite amount of insurance, for example,
4 available to cover such obligations exists. And that's
5 cited to, much cited to, AH Robins Company versus Piccinin,
6 788 F.2d 994, 1007-08 (4th Circuit 1986) that extends the
7 stay to a non-debtor based on an indemnification clause.

8 In addition to that, there's a well-established
9 case law that says bankruptcy courts have extended the stay
10 to non-debtor parties if the claims in question threaten to
11 thwart or frustrate the debtors' reorganization efforts and
12 the injunction is important for effective reorganization.
13 See example In Re The 1031 Tax Group LLC, 397 B.R. 670, 684
14 (Bankruptcy Southern District of New York 200) as well as
15 Hawaii Structural Iron Workers Pension Trust Fund versus
16 Calpine Corporation, 2006 WL 3755175. It's *4 Southern
17 District of New York, December 20th, 2006.

18 So what those cases look at is the potential to
19 impact the case. So here, there is a serious concern from
20 indemnification we've already discussed, but also from
21 having to participate in the proceedings. And since there
22 is an indemnification clause, the ability of the debtors to
23 "sit this one out" is exceedingly limited and, in fact,
24 maybe nonexistent. Nobody has given me a precise parsing of
25 issue preclusion and claim preclusion, but to the extent

1 that the arbitration may decide things that the debtor will
2 then be presented with and have to address for purposes of
3 dealing with a claim of indemnification, I don't think
4 anybody can speak with certainty as to exactly how that will
5 be parsed out.

6 And, frankly, you have a problem for the debtor
7 in terms of burden even if you put aside the indemnification
8 clause, because you have to, the debtors will likely get
9 pulled in for discovery in terms of documents, depositions.
10 And no matter what Mr. Asquith agrees to in this case,
11 everyone agrees that there -- and I believe the quote was
12 tens of thousands of consumers who have potential lawsuits,
13 claims, arbitrations. Some of them have been stayed, it
14 sounds like. But if this case goes forward, it will be very
15 hard to make an argument that those cases, which are
16 similarly situated, should not go forward as well. And then
17 the debtor will have to participate in those cases or
18 certainly at the very minimum, evaluate each of those cases
19 on a case-by-case basis to determine what it needs to do or
20 not do. And that's clearly a burden on the estate and with
21 the tens of thousands of consumers out there, it's a
22 potentially huge burden.

23 This is not uncommon in large mega Chapter 11
24 cases. And that's why the automatic stay exists. And
25 that's why motions to extend the automatic stay are

1 sometimes filed in circumstances where the debtor will
2 indirectly be burdened.

3 The other thing that's noteworthy is Mr. Barefoot
4 mentioned that some of those claims for indemnification will
5 no longer be contingent. They will be now very much real
6 and ready to go. And that will allow claimants to
7 essentially advance their claims beyond where they existed
8 as of the time of the filing. And to the extent that
9 impacts other claimants, it means that those claimants whose
10 claims now go from being contingent to being noncontingent,
11 have improved their lot in life and their status, which is
12 always a concern in bankruptcy and that's what the automatic
13 stay is supposed to avoid.

14 So I agree that the three reasons that are
15 identified by the debtors are a concern: the indemnification
16 issue, the continuation of the arbitration in terms of
17 distraction and undue burdens, and three, the continuation
18 of the arbitration threatening the debtor's ability to
19 effectively defend themselves in connection with suits
20 brought by potentially tens of thousands of consumers.

21 And so -- and I'll end where we started, which is
22 the automatic stay is not (indiscernible). It's not without
23 date. It is significant for purposes of this case that we
24 have a confirmation date in February, February 14th through
25 16th. No one has an ability to see into the future as to

1 whether that will actually happen. If I could predict such
2 things, I no doubt would be -- my whole life would be
3 better.

4 But we have made significant progress. This case
5 has been pending for some time. And my thought is that I'm
6 going to deny this motion. If the confirmation hearing
7 doesn't go forward at that time, and the case is not
8 progressing and something else happens, it takes a
9 significant left turn, you know, Mr. Asquith can come back.
10 But given that I've made a ruling on the motion, the reasons
11 for my ruling still apply. So I'm not -- since I've made a
12 ruling as opposed to parties reaching an agreement, I'm not
13 going to undo my ruling. Now, hold on one minute.

14 All right. So I'm sorry, I'm granting the motion.
15 So since I've made a ruling on the motion -- it was just
16 pointed out that I've used the exact wrong term -- I'm
17 granting the motion. But since I've made a ruling, it's not
18 a matter of negotiation. So if those factors still apply,
19 then my ruling will be the same. So what I'm trying to do
20 though is be fair and clear to everybody. So certainly I
21 encourage the debtors to keep Mr. Asquith, you know, answer
22 his call in February if he has a question about where things
23 stand. But if those same factors apply, they still apply.
24 And I just don't want to see a floodgate of additional
25 motion papers that essentially say, well, the calendar has

1 turned to February, so it's a brand new ball game. It's
2 not. I made a ruling. The ruling is the ruling. But
3 again, I can't predict the future and see where we are. So
4 if events significantly change, then we'll see where we are.

5 MR. RICH: Thank you, Your Honor. May I ask a
6 question for purposes of the record on appeal. Is the Court
7 ruling that any arbitration by a consumer against Gemini --

8 THE COURT: No, I have this -- I have you and I
9 have the debtors in front of me in this adversary
10 proceeding, this motion. So I'm making a ruling on this
11 motion. What I am considering is the fact that both you and
12 Mr. Barefoot cited that there are tens of thousands of
13 consumers out there who exist. And you said you didn't
14 think this would be the first or last of these motions that
15 I would see or concerns that I would see. And I think that
16 is relevant for purposes of determining the potential burden
17 on the estate.

18 MR. RICH: Well so it seems to me do I need to
19 come back to this Court in each of the arbitrations that
20 exists? I guess that's where I'm going. Is this ruling --

21 THE COURT: I'm not in a position to give you an
22 advisory ruling. You have the ruling. You understand what
23 the basis of it is and what law it's based on and what facts
24 it's based on. And so I certainly would encourage you not
25 to waste anybody's time by presenting an application that

1 raises the exact issues that I've ruled on because you're
2 likely then to get a ruling that says for the same reason
3 set forth in the Court's bench ruling of X date, I conclude
4 the following. But again, I can't predict the future. And
5 I don't know the circumstances that we'll find ourselves in
6 a month, two months, three months from now. But I certainly
7 trust counsel, who is evaluating each of the cases that
8 they're involved in, will look at my ruling and determine
9 how they want to proceed in the future.

10 MR. RICH: Well I understand that Your Honor.
11 That's why I was asking because it seems like the logic that
12 you've applied, applies to the arbitration agreement of
13 every consumer, not just Mr. Asquith.

14 THE COURT: Counsel, I can't say anything more to
15 you than I already have. So that's certainly why I started
16 to try to see if we could work something out. But I've made
17 a ruling. Once I make a ruling, I make a rule. So it is
18 what it is at that point.

19 So what I'd ask is if the debtors would submit a
20 proposed order that states the motion is granted for the
21 recent set forth on the record here today. And to the
22 extent there's going to be an appeal, which is obviously
23 your right, I'd ask that the parties submit a transcript so
24 I can at least look at it and make sure it's clean and
25 understandable and obviously because it's a bench ruling, I

1 retain editorial control. But certainly, I promise not to
2 spring a whole brand new issue or theory on you. But again,
3 my purpose is to make sure it's clear. And as we all know,
4 transcripts are usually quite good, but occasionally there's
5 an issue where they're a little hard to comprehend. So
6 that's the point of my request just so that it's clear and
7 everybody knows what the ruling is and then you can all not
8 be burdened by any confusion on that score if you have
9 proceedings elsewhere.

10 All right. So Mr. Barefoot, anything else from
11 you?

12 MR. BAREFOOT: No, Your Honor, we will submit a
13 proposed order and we'll certainly submit the transcript as
14 well.

15 THE COURT: All right. Thank you very much. And
16 let me ask defense counsel, anything else from you, counsel?

17 MR. RICH: No, Your Honor. Thank you, Judge Lane.

18 THE COURT: All right. Again, I appreciate your
19 concern and your zealous advocacy for your client.

20 MR. RICH: Thank you.

21 THE COURT: And I owe you, if you've spent any time
22 in this case listening to hearings, you know that there are
23 a lot of customers who have a lot of things they're
24 concerned about and issues they want addressed. And we're
25 trying to do that here in the context of the case in a

1 collective manner. And hopefully, the progress that we've
2 been making will continue to make progress and I think
3 that's for the betterment of everybody. So fingers crossed.

4 MR. RICH: Thank you, Your Honor. And thank you,
5 Mr. Barefoot. And, Your Honor, it's not personal. You know
6 this is my -- my job is to advocate, so I hope you know
7 that's why I'm here.

8 THE COURT: No, no. I totally get it. I totally
9 get it. I do remember being a lawyer and having clients and
10 I appreciate your zealous advocacy.

11 MR. RICH: Thank you. Thank you, Your Honor.

12 THE COURT: All right. Mr. Barefoot, anything
13 else that we have on for today?

14 MR. BAREFOOT: No, Your Honor. That concludes our
15 agenda. All right. Thank you very much. Thank you to
16 everybody for being here. And, Mr. Barefoot, I figured I
17 would just briefly ask you and I know if Ms. Eubanks were
18 here, she could straighten me out, but I'm just trying to
19 get a sense of what's coming up in the near term in the case
20 when we're next together.

21 MR. BAREFOOT: We're together next, Your Honor, on
22 December 13th.

23 THE COURT: All right. Anything worth talking
24 about in terms of a preview as to the amount of time you
25 might need or anything in that score? Or is it premature to

1 speak on those matters?

2 MR. BAREFOOT: I think it would be premature, Your
3 Honor. The objection deadlines haven't really passed. So
4 I'm not clear at this point on what the scope of contested
5 matters is going to be.

6 THE COURT: All right, fair enough. With that,
7 thank you very much. Be well and see you in a couple of
8 weeks.

9 (Whereupon these proceedings were concluded at
10 12:16 PM)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: December 4, 2023